(1)

90-1031

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JACK HALLER,

Petitioner,

-v-

DONALD BORROR, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the Court below err in concluding that the Ohio statute of limitations for actions that cause bodily injury applies to actions brought pursuant to 42 U.S.C. §§1983 and 1985 contrary to this Court's decision in Owens v. Okure, ___ U.S. ___, 109 S.Ct. 573 and contrary to decisions of federal appellate courts.

PARTIES INVOLVED IN THE PROCEEDINGS

Petitioner:

Jack Russell Haller

Respondents:

Donald Borror
Alphonse Montgomery
Dwight Joseph
David A. Dailey
Robert Snyder
Dennis Matco
O'Reeta Reed
Michael See
Bruce Koenig
The City of Columbus, Ohio
David Johnson
Daniel Abraham
Michael Miller

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GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals from which review is sought is unpublished and appears in the Appendix to this Petition (App.-1).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Petitioners seek a review of a decision of the Sixth Circuit Court of Appeals that was rendered on September 17, 1990 (App.-1).

STATUTES INVOLVED IN THIS CASE

42 U.S.C. §1983

42 U.S.C. §1985

O.R.C. §2305.09

O.R.C. §2305.10

O.R.C. §2305.11(A)

West's Ann. Cal. C.C.P. §340

West's Ann. Cal. C.C.P. §343

Wisc. Stat. Ann. §893.53

Wisc. Stat. Ann. §893.54

STATEMENT OF THE CASE

Plaintiff-Petitioner Jack Haller filed a complaint on June 21, 1989, in which he alleged that Defendants-Respondents Donald Borror, the City of Columbus and officials of the Columbus Department of Public Safety denied him his constitutional right to due process, right to a fair and speedy trial, and the right to the effective assistance of counsel, in violation of 42 U.S.C. §§1983 and 1985 and state torts. The last violation of 42 U.S.C. §§1983 and 1985 occurred on February 26, 1987. Haller v. Borror, ___ F.Supp. ___ (S.D. Ohio 1989), (App.-5). Thus, this case was filed over two years after the last violation of federal law.

Federal District Court Judge Graham in an order dated October 18, 1989 dismissed the case, holding that pursuant to the decision of the Sixth Circuit Court of Appeals in Browning v. Pendleton, 869 F.2d 989 (6th Cir. 1989) (en banc), the two year statute of limitations for "bodily injury" set forth in Ohio Rev. Code

§2305.10 applied to claims brought pursuant to 42 U.S.C. §§1983 and 1985 (App.-10-14). Judge Graham then declined to exercise jurisdiction over state pendent claims.

The Court of Appeals for the Sixth Circuit in an unreported order, dated September 27, 1990, affirmed the district court's dismissal of this case. Haller v. Borror, ___F.2d___, Case No. 89-4004 (App.-1).[1]

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[1]The Sixth Circuit Court of Appeals relied in the case at bar on its decision in Browning v. Pendleton, supra, which was decided soon after this Court's decision in Owens v. Okure, ___ U.S. ___, 109 S.Ct. 573 (1989). Plaintiffs in Browning urged a two year statute of limitations (2305.10), that covers actions for "bodily injury", whereas defendants had argued for a one year statute (Ohio Rev. Code Section 2305.11(A)), that applied to certain specific intentional torts. The Court of Appeals selected the two year statute. The parties did not argue that the four year residual statute [Ohio Rev. Code Section 2305.09(D)], applicable to actions for "injury to the rights of the plaintiff" applied to Section 1983 cases. Thus, the Court of Appeals in Browning did not consider Ohio Rev. Code Section 2305.09(D) in arriving at its decision.

ARGUMENT

THE SUPREME COURT'S DECISION IN OWENS V. OKURE MANDATES THAT THE FOUR YEAR STATUTE OF LIMITATIONS IN OHIO REV. CODE §2305.09(D) BE THE APPLICABLE STATUTE OF LIMITATIONS FOR ACTIONS BROUGHT PURSUANT TO 42 U.S.C. §§1983 AND 1985 IN THE STATE OF OHIO.

The Sixth Circuit Court of Appeals affirmed the district court's dismissal of the instant case, because the Court had previously ruled in Browning v. Pendleton, supra, that the two-year statute of limitations for "bodily injury" was the general or residual statute of limitations for personal injuries and therefore applied to civil rights actions under 42 U.S.C. §§1983 and 1985. The Court of Appeals erred because the statute of limitations for "bodily injury" is not the general or residual statute of limitations on personal injuries. Rather, it is one of several statutes of limitations for personal injuries in Ohio. This Court should grant certiorari to clarify the meaning of Owens v. Okure, supra. Furthermore, this Court must prevent courts from using as statutes of

limitations for cases brought under 42 U.S.C. §1983 specific personal injury statutes that do not cover the wide spectrum of civil rights claims.

This Court has held that in determining the statute of limitations for cases brought under 42 U.S.C. §1983, federal courts should use the most analogous state statute of limitations. Wilson v. Garcia, 471 U.S. 261, 268, 105 S.Ct. 1938, 1942 (1985).

In Owens v. Okure, ___ U.S. ___, 109 S.Ct. 573 (1989), this Court held that civil rights violations are analogous to state personal injury torts. Thus, if a state has one statute of limitations that covers all personal injury torts, that statute would apply to cases brought under 42 U.S.C. §1983. However, as this Court pointed out, all states have multiple intentional tort and multiple personal injury statutes of limitations. Owens v. Okure, supra, 109 S.Ct. at 578. This Court rejected the application of the intentional tort approach

and, in order to provide "ease and predictability in all 50 States," the Court enunciated the following rule for determination of a statute of limitation for §1983 actions:

> where state law provides multiple statutes of limitations for personal injury actions, courts considering Section 1983 claims should borrow the general or residual statute for personal injury actions.

Owens v. Okure, supra, 109 S.Ct. at 582.

This Court reasoned that the statute of limitations must be broad enough to cover such claims as employment discrimination, denial of a job or benefit because of the denial of due process, indifference to the medical needs of prisoners, the seizure of property without advance notice, denial of the right to privacy, interference with First Amendment rights, and intentional abuse by government officials. See, Owens v. Okure, supra, 109 S.Ct. at 581. Only the state general or residual personal injury statute could cover the "wide spectrum" of claims encompassed by Section 1983.

This Court discussed Ohio's three specific

statutes of limitations that cover personal injuries: Ohio Rev. Code Section 2305.10, covering "bodily injury"; Section 2305.11(A), covering "libel, slander, malicious prosecution, or false imprisonment"; and Section 2305.111, covering "assault and battery". Owens v. Okure, supra, 109 S.Ct. at 578. None of these statutes applies to the "wide spectrum" of civil rights claims. Therefore, the residual or general personal injury statute of limitations, §2305.09(D), is the most appropriate and analogous to Section 1983 actions in Ohio.

In rejecting the application of these types of specific personal injury statutes of limitations, this Court stated:

> In marked contrast to the multiplicity of state intentional tort statutes of limitations, every State has one general or residual statute of limitations governing personal injury actions. Some States have a general provision which applies to all personal injury actions with certain specific exceptions. . . . Others have a residual provision which applies to all actions not specifically provided for, including personal injury actions. . . .

Owens v. Okure, supra, 109 S.Ct. at 580 [footnotes omitted].

The Sixth Circuit Court of Appeals, contrary to this Court's direction, held that the Ohio two year statute of limitations for "bodily injury" (Ohio Rev. Code §2305.10) applied to §1983 actions.

Ohio Rev. Code §2305.10 is not a general or residual statute of limitations that covers all or even most civil rights actions. Many civil rights actions do not involve "bodily injury" -- e.g. denial of the right to a speedy trial, denial of due process, employment discrimination, invasion of the right to privacy. §2305.10 is more analogous to cases in which plaintiffs allege that the defendant's negligence caused bodily injury. See, Love v. City of Port Clinton, 37 Ohio St.3d 98, 524 N.E.2d 166, 167 (1988). "Bodily injury" is not the same as "personal injury" and in fact covers only a portion of injuries to the person.

The residual Ohio statute of limitations

for personal injuries is Ohio Rev. Code §2305.09(D), which states that actions shall be brought within four years "for an injury to the rights of the plaintiff not arising on contract nor enumerated in section 2305.10 to 2305.12 inclusive, 2305.14 and 1304.29 of the Revised Code." It is almost identical in language to this Court's example of a personal injury residual statute which should be applied to cases brought under §1983: "(a)ny injury to the person or rights of another not arising from contract and not specifically enumerated." Owens, supra, 109 S.Ct. at 580, n. 9.

Ohio Rev. Code §2305.09(D) is the one personal injury residual statute of limitations in Ohio. Certainly, parties could not be expected to assume that a statute of limitations that applies to only "bodily injuries" would apply to all civil rights actions. The uncertainty of the applicable statute of limitations, even after the Sixth Circuit handed down its decision in Browning, supra, has

spawned considerable litigation. See, for instance, Lundblad v. Celeste, 874 F.2d 1097 (6th Cir. 1989), Thomas v. Shipka, 872 F.2d 772 (6th Cir. 1989); and Valerio v. Dahlberg, 716 F.Supp. 1031, 1042 (S.D. Ohio 1988).

Ohio courts have indicated that all personal injuries are not covered by the "bodily injury" statute of limitations. Ohio courts have applied the four year state residual statute of limitations [Ohio Rev. Code §2305.09 (D)] to various types of personal injuries analogous to claims under Section 1983. For instance, Ohio courts have held that the state residual statute of limitations applies to claims for loss of consortium, intentional infliction of emotional distress, and invasion of the right to privacy. Yeager v. Local Union 20, 6 Ohio St.3d 369, 453 N.E.2d 666, 672 (1983) (intentional infliction of emotional distress claim); Holzwart v. Wehman, 1 Ohio St.3d 26, 437 N.E.2d 589, 590 (1982) (loss of consortium claim); and Morgan v. Hustler Magazine, Inc.,

653 F.Supp. 711, 716 (N.D. Ohio 1987) (invasion of the right to privacy claim). The torts of intentional infliction of emotional distress and invasion of the right to privacy are analogous to such civil rights violations as employment discrimination, denial of due process, and mistreatment of prisoners. Therefore, such state torts are often joined in suits with federal civil rights claims. See, for instance, Valerio v. Dahlberg, supra, 716 F.Supp. at 1040-1041.

The decision of the Court of Appeals in the instant case is inconsistent with the decisions of numerous other federal appellate courts. Other federal courts of appeals have held that state statutes of limitations that govern injury to the persons or to the rights of persons apply to actions brought under Section 1983. See, for instance, Cito v. Bridgewater Township Police Department, 892 F.2d 23, 25 (3rd Cir. 1989); Gray v. Lacke, 885 F.2d 399, 407 (7th Cir. 1989), cert. denied, ___U.S.___, 110 S.Ct. 1476

(1990); Callwood v. Questel, 883 F.2d 272, 274 (3rd Cir. 1989); Kalimara v. Illinois Department of Corrections, 879 F.2d 276 (7th Cir. 1989); Del Percio v. Thornsley, 877 F.2d 785, 786 (9th Cir. 1989); Jones v. Preuit & Mauldin, 876 F.2d 1480, 1484 (11th Cir. 1989)(en banc); Cooper v. City of Ashland, 871 F. 2d 104, 105 (9th Cir. 1989); Perez v. Seevers 869 F.2d 425, 426 (9th Cir. 1989), cert. denied, ___U.S.___, 110 S.Ct. 172 (1989); and Elzy v. Roberson, 868 F.2d 793, 794 (5th Cir. 1989).

The Third Circuit Court of Appeals adopted a statute of limitations for actions brought under Section 1983 that applies to an "action...for any injury to the...rights of another". Callwood v. Questel, supra, 883 F.2d at 274, n.2. This statute of limitations is almost identical to Ohio Rev. Code 2305.09(D), which covers "an injury to the rights of the plaintiff".

All of the above courts used personal injury statutes that would apply to all civil

rights actions in order to determine the applicable statute of limitations for Section 1983. Some of the courts rejected statutes of limitations that governed claims for which there was no other statute of limitations. See, for instance, Del Percio v. Thornsley, supra and Cito v. Bridgewater Township Police Department, supra. As the Ninth Circuit Court of Appeals stated, the broad catch-all section in the California law that governs "actions for relief not hereinbefore provided for" could not apply to Section 1983 cases, as all personal injury actions were "provided for" in another statute. Del Percio v. Thornsley, supra, 877 F.2d at 786, n. 3. See, West's Ann. Cal.C.C.P. Sections 340 (1) and 343.

The holding by the Sixth Circuit Court of Appeals that actions for "bodily injury" are most analogous to Section 1983 civil rights actions is particularly contrary to a ruling by the Seventh Circuit Court of Appeals. The Seventh Circuit Court of Appeals held that the

Wisconsin six year statute of limitations governing actions "to recover damages for an injury to the character or rights of another, not arising in contract...." applied to actions brought pursuant to Section 1983. Gray v. Lacke, 885 F.2d at 407-408. See, Wisc. Stat. Ann. §893.53.

The Seventh Circuit Court of Appeals rejected the three year statute of limitations that governed actions for personal injuries, because the statute of limitations for actions for injury to the rights of another was "broader" than that for personal injury actions. Gray v. Lacke, 885 F.2d at 408. See, Wisc. Stat. Ann. §893.54. As the Seventh Circuit Court stated, "(t)he broad language of the personal rights statute of limitations is also consistent with the purpose of Section 1983, which is to provide a remedy for a 'wide spectrum of claims' that include more than just bodily injury. Owens, 109 S.Ct. at 581." Gray v. Lacke, 885 F.2d at 408.

Thus, the Seventh Circuit Court of Appeals recognized, unlike the Sixth Circuit Court of Appeals, that civil rights violations do not involve just "bodily injuries", and that Owens, supra, requires that the statute of limitations for Section 1983 cover the "wide spectrum" of civil rights claims. Owens v. Okure, supra, 109 S.Ct. at 581.[2]

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[2] Contrast Gray v. Lacke, supra, with Collard v. Kentucky Board of Nursing, in which the Sixth Circuit Court of Appeals held that a Kentucky state statute of limitations covering "personal injuries" should be applied to civil rights claims rather than the statute of limitations covering "personal rights". Collard v. Kentucky Board of Nursing, 896 F.2d 179, 182 (6th Cir. 1990). The Court's decision in Collard, supra, was based on this Court designating "personal injury statutes", rather than "personal rights" statutes, as the benchmark for establishing the §1983 statute of limitations. Collard v. Kentucky Board of Nursing, supra, 896 F.2d 179 at 182.

CONCLUSION

The Sixth Circuit Court of Appeals has not followed this Court's mandate in Owens v. Okure, supra, to use a state residual personal injury statute of limitations for actions brought under 42 U.S.C. §1983 and §1985. This Court should therefore grant the petition for certiorari and summarily reverse the decision by the Court of Appeals, based on Owens v. Okure, supra. In the alternative, this Court should grant the petition for certiorari and set the case down for argument so that the Court may resolve any uncertainties caused by Owens and to resolve conflicts among the Circuit Courts of Appeals as to what Owens means.

Respectfully submitted,

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No. 89-4044

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK RUSSELL HALLER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
DONALD BORROR; ALPHONSE MONTGOMERY; DWIGHT JOSEPH; DAVID A. DAILEY; ROBERT SNYDER; DENNIS MATCO; O'REETA REED; MICHAEL SEE; BRUCE KOENIG; THE CITY OF COLUMBUS, OHIO; DAVID JOHNSON; DANIEL ABRAHAM; MICHAEL MILLER,	)	
	)	
Defendants-Appellees.	)	

BEFORE: MILBURN, BOGGS and SUHRHEINRICH, Circuit Judges.

Jack Russell Haller, through counsel, appeals the district court's judgment dismissing his civil rights action filed pursuant to 42 U.S.C. § 1983 and § 1985. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and briefs, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary, declaratory, and injunctive relief, Haller sued several local, county, and federal officials, as well as a private citizen, alleging violations of various constitutional rights. Haller also alleged several pendent state claims. The district court dismissed Haller's federal claims as barred by the statute of limitations and subsequently dismissed the pendent state claims. Haller filed a timely appeal.

Upon review, we conclude that the district court properly dismissed Haller's claims, as it appears beyond doubt that Haller can prove no set of facts which would entitle him to relief. Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). The two year statute of limitations set forth in Ohio Rev. Code § 2305.10 applies to Haller's claims filed under 42 U.S.C. § 1983 and § 1985. Browning v. Pendleton, 869 F.2d 989, 990 (6th Cir. 1989) (en banc). The district court properly determined that the latest date Haller could have

"discovered" his cause of action was February 26, 1987, see Hicks v. Hines, Inc., 826 F.2d 1543, 1544 (6th Cir. 1987); therefore, the statute of limitations had expired by the time Haller filed suit on June 21, 1989. Since Haller has not alleged that he was being held in a county jail or the Ohio correctional system prior to trial, Ohio's tolling statute, Ohio Rev. Code § 2305.16, does not apply. See Austin v. Brammer, 555 F.2d 142, 143 (6th Cir. 1977). Lastly, the district court properly dismissed Haller's pendent state claims. See Foster v. Walsh, 864 F.2d 416, 419 (6th Cir. 1988).

Accordingly, we affirm the district court's judgment for these reasons and those set forth in the district court's order filed on October 18, 1989. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____/s/ Leonard Green_____
Clerk

ISSUED AS MANDATE: October 19, 1990
COSTS: None

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jack R. Haller,

Plaintiff,

vs. Case No. C2-89-538
JUDGE GRAHAM

Donald A. Borror, et al.,

Defendants.

ORDER

In an order dated August 31, 1989, this Court noted that the gist of plaintiff's 42 U.S.C. §1983 action appeared to be the claimed violation of his constitutional rights by malicious prosecution of a criminal case. The Court further noted that the complaint alleged that the criminal prosecution in question had not yet terminated and that accordingly one of the elements of a claim for malicious prosecution under the law of the State of Ohio was missing. Such an analysis would lead to a dismissal of the complaint. See: Coogan v. City of Wixom, 820 F.2d 170, 174 (6th Cir. 1987). Thus, the Court ordered the plaintiff to

show cause why this case should not be dismissed for failure to state a claim upon which relief can be granted.

On September 11, 1989, plaintiff filed his response to the Court's Order. In his response, plaintiff does not contest the Court's tentative conclusion that his malicious prosecution claims must be dismissed. He argues instead that his complaint "does not merely allege malicious prosecution as contended by this Court but rather alleges inter alia that the Defendant's [sic] engaged in activities and/or conduct in an attempt to deprive him of his constitutional rights to due process, fair trial, effective assistance of counsel, speedy trial, false arrest, abuse of process, right of privacy and right to be protected against unreasonable searches and seizures. Even if convicted on retrial, Plaintiff still has a cause of action against these Defendants."

If defendants' complaint were construed so as to state claims under 42 U.S.C. §1983 other

than claims for malicious prosecution, such claims would be barred by the statute of limitations. The complaint recites a litany of improper conduct attributed to the defendants in connection with plaintiff's indictment and prosecution on a charge of extortion. All of these alleged actions occurred prior to or during the trial of that case which plaintiff alleges concluded on February 26, 1987. This lawsuit was not filed until June 21, 1989, some two years and four months after the end of the trial. Clearly, all of the conduct complained of by the plaintiff occurred over two years before this suit was filed.

In Browning v. Pendleton, 869 F.2d 989 (6th Cir. 1989) the Sixth Circuit held that the statute of limitations for 42 U.S.C. §1983 civil rights actions arising in Ohio is two years. The City of Columbus defendants have asserted the statute of limitations as a defense as has defendant Borror. Defendant Johnson has filed a motion to dismiss on the grounds of the

statute of limitations.

In accordance with the foregoing discussion and in accordance with the discussion contained in this Court's Order of August 31, 1989, the Court concludes that with respect to plaintiff's attempt to state federal claims, his complaint fails to state claim upon which relief can be granted. His alleged malicious prosecution claim is premature because he has not and apparently cannot allege that the prosecution terminated in his favor. If the complaint is construed so as to state some other claim or claims under 42 U.S.C. §1983, they would be barred on their face by the applicable statute of limitations. Under the circumstances, the Court will decline to entertain jurisdiction over plaintiff's pendent state claims. Accordingly, plaintiff's claim under 42 U.S.C. §1983 based on malicious prosecution is dismissed with prejudice. Plaintiff's pendent state claims are dismissed without prejudice. The costs of this action are assessed against

the plaintiff.

It is so ORDERED.

___/s/ James L. Graham_____
JAMES L. GRAHAM
United States District Judge

DATE: October 18, 1989

Title 42 U.S.C. §1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 42 U.S.C. §1985 Conspiracy to interfere with civil rights

Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force,

intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the Untied States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully,

or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or

indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or

property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

O.R.C. §2305.09 Four years; certain torts.

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

O.R.C. §2305.10 Bodily injury or injury to personal property.

An action for bodily injury or injuring personal property shall be brought within two

years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised

Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

O.R.C. §2305.11 Time limitations for bringing certain actions; definitions.

(A) An action for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statue for a penalty or forfeiture, shall be commenced within one year after the cause of action accrued, provided

that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation shall be commenced within two years after the cause of action accrued.

West's Ann. Cal. C.C.P. §340 One year

Within one year:

(1) **Statutory penalty or forfeiture to individual and state.** An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

(2) **Statutory forfeiture or penalty to state.** An action upon a statute for a forfeiture or penalty to the people of this state.

(3) **Libel, slander, assault, battery, false imprisonment, seduction, injury or death from wrongful act or neglect, forged or raised checks, injury to animals by feeder or veterinarian.** An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a

forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in section 4826 of the Business and Professions Code, for such persons neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl.

West's Ann. C.C.P. §343 Four years; relief not otherwise provided for

ACTIONS FOR RELIEF NOT HEREINBEFORE PROVIDED FOR. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.

Wis. Stat. Ann. §893.53. Action for injury to character or other rights

An action to recover damages for an injury

to the character or rights of another, not arising on contract, shall be commenced within 6 years after the cause of action accrues, except where a different period is expressly prescribed, or be barred.

Wis. Stat. Ann. §893.54. Injury to the person

The following actions shall be commenced within 3 years or be barred:

(1) An action to recover damages for injuries to the person.

(2) An action brought to recover damages for death caused by the wrongful act, neglect or default of another.

(2)

NO. 90-1031

SUPREME COURT OF THE UNITED STATES
October Term, 1990

JACK HALLER,

Petitioner,

v.

DONALD BORROR, ET AL.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT DONALD BORROR

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STATEMENT OF THE CASE

Plaintiff-Petitioner Jack Haller filed this action in the United States District Court for the Southern District of Ohio, Eastern Division, on June 21, 1989, more than two years after his February 26, 1987 conviction on extortion charges in the Court of Common Pleas, Franklin County, Ohio.

In his Complaint, Haller alleges that his arrest and conviction for extortion were unlawful; he asserts a panoply of claims arising under federal civil rights statutes (42 U.S.C. §§ 1983 and 1985) and state tort law (malicious prosecution, abuse of process, invasion of privacy, negligence, false imprisonment, and intentional infliction of emotional distress). Haller alleges that each defendant-respondent was associated in some way with the state criminal proceedings against him; Defendant-Respondent Donald Borror was the victim of the extortion, and the remaining defendants-respondents include the Safety Director of the City of Columbus, the Chief of Police, various police officers, a special agent of the Federal Bureau of Investigation, the City of Columbus, the individual prosecutors who obtained

the conviction, and the Franklin County Prosecuting Attorney. Haller claims that the defendants-respondents are members of "the Republican power elite" and that they "conspired . . . to discriminate against anyone who challenged the class of power elite," including Haller. Amended Civil Complaint, par. 87, 90.

In brief, Haller alleges that he became involved in an employment dispute with Borror while serving as an executive of a company owned by a Borror corporation, and that he formally settled his claims against Borror in 1985 in exchange for a settlement payment of $50,000.00. Id. at para. 23. He admits that he then embarked on a campaign of threats and harassment directed against Borror in an attempt to obtain additional sums in excess of the settlement agreement. Id. at par. 21, 33. The Columbus police department began an investigation, at Borror's request, and Haller was arrested on July 9, 1985. Id. at para. 43. According to Haller, Defendant-Respondent Dailey, a Columbus police

captain, attempted to "frame" him for the extortion charge by manufacturing evidence and by murdering a fellow officer who refused to cooperate in the conspiracy. Id. at par. 24-28. Numerous other misdeeds are attributed to the defendants-respondents, ranging from improper supervision of employees to violations of discovery orders during the criminal proceedings against Haller. Haller concedes that he was aware of this alleged misconduct prior to his conviction on the extortion charges, and that these same accusations were the basis of his defense at that trial. Id. at par. 50-54.

The District Court dismissed the instant action on October 18, 1989, concluding that 1) any civil rights claims based on malicious prosecution were premature because the state criminal proceedings had not yet terminated in Haller's favor; 2) the remaining civil rights claims accrued on or before Haller's extortion conviction on February 26, 1987, and were thus barred by the applicable two-year statute of limitations; and 3) pendent jurisdiction

would not be exercised over the state tort claims in the absence of viable federal claims.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment on September 27, 1990, holding that its prior decisions had correctly established that "[t]he two year statute of limitations set forth in Ohio Rev. Code § 2305.10 applies to . . . claims filed under 42 U.S.C. §1983 and §1985." Order, at 2. Haller now seeks review of that ruling by this Court.

ARGUMENT

Petitioner's request for a writ of certiorari should be denied. As set forth below, this litigation does not present any significant issues of law, policy, or fairness. There is no conflict between any lower courts as to the appropriate statutory limitation period for actions arising in Ohio under 42 U.S.C. §§ 1983 or 1985. The decision of the Court of Appeals below does not conflict with applicable decisions of this Court and does not implicate any important question of federal law which should be settled by this Court. Petitioner has utterly failed to present any reason for the Court to accept jurisdiction in this matter.

1. First, contrary to Petitioner's assertions (Petition for a Writ of Certiorari, at 8-9), there is no "uncertainty" as to the appropriate statute of limitations in the Sixth Circuit which has "spawned considerable litigation." Since this Court clarified the standard for determining the applicable state statutory limitation period for federal civil rights

actions in Owens v. Okure, --U.S.--, 109 S. Ct. 573 (1989), the Court of Appeals for the Sixth Circuit has consistently held that actions of this type which arise in Ohio are subject to the two year limitation period of Ohio Rev. Code § 2305.10. See, e.g., Farber v. Massillon Board of Education, 917 F.2d 1391, 1400 (6th Cir. 1990); Lundblad v. Celeste, 874 F.2d 1097, 1103 (6th Cir. 1989); Thomas v. Shipka, 872 F.2d 772, 773 (6th Cir. 1989); Browning v. Pendleton, 869 F.2d 989, 992 (6th Cir. 1989). The Sixth Circuit Court of Appeals has not deviated from this conclusion in a single reported or unreported case; there simply is no "uncertainty."

Petitioner apparently believes that "uncertainty" remains regarding this question because the decision in Browning v. Pendleton, supra, considered only Ohio Rev. Code § 2305.10, a two year statute of limitations, and Ohio Rev. Code § 2305.11, a one year statute of limitations, when it applied the standard announced by this Court in Owens v. Okure, supra (Petition, at 2, n.1); the Browning opinion does

not discuss Ohio Rev. Code § 2305.09(D), the four year catch-all statute of limitations which Petitioner now invokes to revive his stale claims. However, the Browning decision does not address Ohio Rev. Code § 2305.09(D) precisely because it is not applicable to civil rights actions under the legal standard described in the Owens v. Okure decision. (In fact, when this Court listed potentially applicable Ohio intentional and unintentional tort statutes of limitations in Owens v. Okure, supra, --U.S.--, 109 S. Ct. at 578, it similarly failed to even mention this catch-all statute.) In any event, contrary to Petitioner's assertions, the Court of Appeals for the Sixth Circuit later eliminated any "uncertainty" on this question and specifically rejected the use of the four year limitation period of Ohio Rev. Code § 2305.09(D) in federal civil rights litigation arising in Ohio. See, e.g., Paladin v. Doyle, 914 F.2d 1494 (6th Cir. 1990) (No. 90-3242, slip op.; 1990 U.S. App. Lexis 17324). ("[T]he court has considered plaintiffs' argument . . . that Ohio

Rev. Code § 2305.09(D) should be adopted . . . . [T]hat contention is without merit.")

2. Second, the two year limitation period which the Sixth Circuit Court of Appeals has borrowed from Ohio Rev. Code § 2305.10 is not so short as to create injustice or to unfairly prejudice Petitioner in the assertion of his civil rights claims. The majority of the cases now relied upon by Petitioner in seeking review by this Court adopt two year statutory limitation periods in these circumstances. See, e.g., Cito v. Bridgewater Township Police Dept., 892 F.2d 23 (3d Cir. 1989) (New Jersey); Callwood v. Questel, 883 F.2d 272 (3d Cir. 1989) (Virgin Islands); Kalimara v. Illinois Dept. of Corrections, 879 F.2d 276 (7th Cir. 1989) (Illinois); Cooper v. City of Ashland, 871 F.2d 104 (9th Cir. 1989) (Oregon); Perez v. Seevers, 869 F.2d 425 (9th Cir. 1989) (Nevada). Most of the remaining cases now cited by Petitioner adopt a one year statutory limitation period. See, e.g., Del Percio v. Thomsley, 877 F.2d 785 (9th Cir. 1989) (California); Jones v.

Preuit & Mauldin, 876 F.2d 1480 (11th Cir. 1989) (Alabama); Elzy v. Roberson, 868 F.2d 793 (5th Cir. 1989) (Louisiana). In Jones v. Preuit & Mauldin, supra, 876 F.2d at 1484, the Court of Appeals for the Eleventh Circuit observed:

> Under federal law, a borrowed limitations period should provide a reasonable period of time in which a plaintiff can file suit . . . . No case, however, has held that a one-year limitations period conflicts with the policies behind section 1983 by providing an insufficient period in which to file suit. We decline to so hold in this case.

The use of the Ohio two year statutory limitation period in this case is not oppressive or unfair to Petitioner. Although he argues that he "could not be expected to assume" that this statute would apply to his civil rights claims (Petition, at 8), these claims were subject to the one year limitation period of Ohio Rev. Code § 2305.11 at the time they arose, see Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), cert. denied, 476 U.S. 1174 (1986), and appeared to be extinguished even before the two year limitation period of Ohio Rev. Code

§ 2305.10 was first applied to Ohio cases in Browning v. Pendleton, supra, following the decision in Owens v. Okure, supra.

3. Third, the ruling of the Court of Appeals below is not in conflict with the decisions of any other state or federal courts regarding the appropriate statute of limitations for civil rights actions arising in Ohio. The "inconsistent" decisions now cited by Petitioner (Petition, at 10) do not address the Ohio statutes of limitations or similar statutes of limitations in other jurisdictions. Only the consistent decisions of the Court of Appeals for the Sixth Circuit, cited above, have applied the standard announced in Owens v. Okure, supra, to a state statutory scheme which includes 1) specific intentional tort statutory limitation periods, 2) a general tort statute of limitations applicable to "bodily injury" and "property damage," and 3) a catch-all statute of limitations which is applicable to "an injury to the rights of the plaintiff" not enumerated elsewhere, but which does not mention personal injuries. See Ohio

Rev. Code § 2305.11, 2305.10, and 2305.09(D). Every case now relied upon by Petitioner addresses a different statutory scheme with differently defined categories of limitation periods; although he claims that Gray v. Lacke, 885 F.2d 339 (7th Cir. 1989), cert. denied, --U.S.--, 110 S. Ct. 1476 (1990), is "particularly contrary" to the ruling below (Petition, at 12), that case involved Wisconsin statutes which do not provide a separate limitation period for bodily injury and property damage claims.

Even if the statutory schemes of other states could be considered in constructing a "conflict" between circuit courts for purposes of the instant Petition, the statutes which are most like the Ohio statutes have been applied in complete harmony with the Sixth Circuit decisions. For example, in Kalimara v. Illinois Dept. of Corrections, 879 F.2d 276 (7th Cir. 1989), the Court borrowed the Illinois two year statutory limitation period which applies only to direct physical injuries to the person, see Berghoff v. R.J. Frisby Mfg. Co., 720 F. Supp. 649, 652 (N.D. Ill.

1989), and refused to adopt the Illinois catch-all statute which, like Ohio Rev. Code § 2305.09(D), "does not mention personal injury actions and is the sort of . . . 'catchall' limitation period rejected in . . . Owens . . . ." 879 F.2d at 277. The decision of the Court of Appeals in the present case is completely consistent with that holding.

Aside from Gray v. Lacke, supra, discussed above, Petitioner does not cite a single decision borrowing a statute of limitations which, like Ohio Rev. Code § 2305.09(D), is limited to "injuries to rights" and does not mention "injuries to the person." Indeed, in Cito v. Bridgewater Twnp. Police Dept., supra, 892 F.2d at 25, the Court expressly rejected the use of such a statute. Ohio Rev. Code § 2305.09(D) is not "almost identical in language" (Petition, at 8) to the example of an appropriate statute offered in Owens v. Okure, supra: "injury to the person or rights of another . . . ." --U.S.--, 109 S. Ct. at 580, n.9 (emphasis added). The Ohio statute does not even mention injuries to the person.

Thus, the decision of the Court below is not in conflict with the decision of any other court, and, to the extent that analogous statutory schemes of other states are relevant, it is consistent with the holdings in other circuits.

4. Fourth, the decision below does not conflict with this Court's decision in Owens v. Okure, supra. As noted above, the language of Ohio Rev. Code § 2305.09(D) differs in fundamental and important ways from the exemplary language used by this Court in that opinion. In fact, the Owens Court did not purport to address limitation statutes like those of Ohio; instead, it held, in connection with distinctly different New York statutes:

> This case raises the question of what limitations period should apply to a § 1983 action where a State has one or more statutes of limitations for certain enumerated intentional torts, and a residual statute for all other personal injury actions. We hold that the residual or general personal injury statute of limitations applies.

--U.S.--, 109 S. Ct. at 574. Obviously, the Ohio statutory scheme does not fall within this description;

as noted above, it has separate statutes for intentional torts, a general statute for bodily injury and property damage resulting from unintentional torts, and a catch-all statute that does not even mention personal injury actions.

In order to invent a conflict with Owens v. Okure in the present case, Petitioner must pretend 1) that Ohio Rev. Code § 2305.10 is limited to intentional torts, when it clearly is not, and 2) that Ohio Rev. Code § 2305.09(D) is "the residual or general personal injury statute of limitations," supra, --U.S.--, 109 S. Ct. at 574, when its language does not even mention injuries to persons.

In an attempt to avoid these logical deficiencies, Petitioner argues that Ohio Rev. Code § 2305.09(D) has been applied to three unique tort causes of action, and that it is therefore a "residual" (although not "general") "personal injury statute of limitations." He cites Ohio state court decisions involving loss of consortium, invasion of privacy, and intentional infliction of emotional distress. (Petition,

at 9-10.) There are two basic flaws in that argument. First, Ohio Rev. Code § 2305.09(D) does not include "injuries to the person" or "personal injuries" in the statutory language describing its scope, and the three cited tort causes of action do not involve "personal injury," which is defined under Ohio law as "an injury either to the physical body of a person or to the reputation of a person, or to both." Smith v. Buck, 119 Ohio St. 101 (1928). Second, Petitioner's argument is in direct contravention of the holding of this Court in Owens v. Okure, supra, --U.S.--, 109 S. Ct. at 580, "reject[ing] the practice of drawing narrow analogies between § 1983 claims and state causes of action" in determining the appropriate statutory limitation period for federal civil rights actions. For example, Petitioner argues that "[t]he torts of intentional infliction of emotional distress and invasion of the right to privacy are analogous to . . . civil rights violations" (Petition, at 10), despite this Court's admonition that "[t]he adoption of one analogy rather than another will often be somewhat

arbitrary . . . . Almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations." Wilson v. Garcia, 471 U.S. 261, 272 n.24, 272-73 (1985).

Following the command of the Wilson decision, supra, 471 U.S. at 270, that "Congress intended the characterization of § 1983 to be measured by federal rather than state standards," the Court in Collard v. Kentucky Board of Nursing, 896 F.2d 179 (6th Cir. 1990), rejected the same argument now made by Petitioner. The plaintiff in that case argued that the Kentucky catch-all statute of limitations, which -- like Ohio Rev. Code § 2305.09(D) -- applies to "an action for an injury to the rights of the plaintiff not arising on contract and not otherwise enumerated," should govern civil rights actions because the general Kentucky tort statute of limitations has been limited to physical injury claims by Kentucky state courts and does not apply to

emotional distress claims. See Craft v. Rice, 671 S.W.2d 247 (Ky. 1984). The Collard Court noted that the language "personal injury" does not appear in the catch-all statute and that, pursuant to the language in Wilson v. Garcia, supra, quoted above, Kentucky state court decisions characterizing state tort claims for statutory limitation purposes are not controlling in federal civil rights actions. 896 F.2d at 182-83. Accordingly, it refused to adopt the catch-all statute and applied the physical injury statute to § 1983 claims.

The decision of the Court of Appeals in the present case reached the same result; it does not conflict with Owens v. Okure, supra, or with other decisions of this Court. Ohio Rev. Code § 2305.09(A) is not the "general or residual statute of limitations for personal injury actions," and the Court of Appeals properly refused to borrow its limitation period in this litigation.

CONCLUSION

Petitioner's request for a writ of certiorari should be denied. The instant litigation does not raise any significant issues of law, policy, or fairness. There is no uncertainty as to the appropriate statute of limitations for federal civil rights actions arising in Ohio; the Court of Appeals for the Sixth Circuit has expressly rejected Petitioner's claim that the four year limitation period of Ohio Rev. Code § 2305.09(D) should be applied, and its adoption of the two year limitation period of Ohio Rev. Code § 2305.10 does not conflict with the decisions of any other court on this issue.

The courts of appeals have uniformly held that even a one year statutory limitation period is sufficient for federal civil rights actions. Petitioner cannot claim that he was unfairly surprised by the adoption of the two year period, when a one year statutory limitation period was in force at the time he permitted his causes of action to expire.

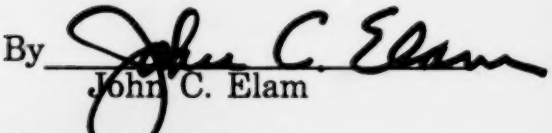
Finally, the decision below is consistent with rulings in other circuits which have addressed similar statutes, and does not conflict in any way with previous decisions of this Court.

Accordingly, the request for a writ of certiorari should be denied.

Respectfully submitted,

VORYS, SATER, SEYMOUR
AND PEASE

John C. Elam

By 
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The undersigned hereby certifies that three copies of the foregoing Brief in Opposition for Respondent Donald Borror were served upon all other parties in this action:

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via regular U.S. Mail, postage prepaid, this 24th day of January, 1991:

John C. Elam

APPENDIX

Ohio Rev. Code § 2305.09 (Page 1981)

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

Ohio Rev. Code § 2305.10 (Page 1989 supp.)

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

Ohio Rev. Code § 2305.11 (Page 1989 supp.)

(A) An action for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty or forfeiture, shall be commenced within one year after the cause of action accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation shall be commenced within two years after the cause of action accrued.

(B)(1) Subject to division (B)(2) of this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the action accrued, except that, if prior to the expiration of that one-year period, a claimant who allegedly possesses a medical, dental, optometric, or chiropractic claim gives to the person who is the subject of that claim written notice that the claimant

is considering bringing an action upon that claim, that action may be commenced against the person notified at any time within one hundred eighty days after the notice is so given.

* * * *

No. 90-1031

(3)

In The

Supreme Court of the United States

October Term, 1990

JACK HALLER,

Petitioner,

v.

DONALD BORROR, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION BY RESPONDENTS THE CITY OF COLUMBUS, OHIO, MONTGOMERY, JOSEPH, DAILEY, SNYDER, MATCO, REED AND SEE

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QUESTION FOR REVIEW

Did the United States Court of Appeals for the Sixth Circuit err in affirming the determination of the District Court that Ohio Revised Code Section 2305.10 is Ohio's general or residual statute of limitations for personal injury actions?

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SUMMARY OF ARGUMENT

I. THE EXERCISE OF SOUND DISCRETION REQUIRES DENIAL OF WRIT OF CERTIORARI.

Petitioner wrongly asserts the existence of a conflict among the circuits as no other circuit has addressed which Ohio statute of limitation should be borrowed to carry out the directives of *Owens v. Okure*, 488 U.S. 235, 102 L.Ed 2d 594 (1989). Cases cited by Petitioner followed the *Browning v. Pendleton*, 869 F.2d 989 (6th Cir., 1989) (en banc) rationale and, in Illinois, a close counterpart of O.R.C. § 2305.10 was borrowed. The Wisconsin statutory scheme is different given the judicial gloss previously applied to various statutes of that state.

The selection of Ohio's general or residual statute of limitation for personal injury actions is guided by Ohio's definition of "personal injury." This definition, unchanged for more than sixty years, ought not to be revised and then applied as revised to compel the selection of some statute other than O.R.C. § 2305.10.

II. OHIO REVISED CODE SECTION 2305.10 IS OHIO'S GENERAL OR RESIDUAL STATUTE OF LIMITATIONS FOR PERSONAL INJURY ACTIONS.

"Personal injury" has a specific meaning under Ohio Law. Ohio Revised Code § 2305.10 governs all personal injury actions under Ohio law except libel, slander, and battery which have other more specific statutes of limitation. General tort claims such as loss of consortium and infliction of emotional distress are governed by O.R.C. § 2305.09(D) only because such claims are not personal

injury claims under the law of Ohio. O.R.C. § 2305.09(D) does not govern any personal injury actions in Ohio since it does not govern any action for bodily injury nor does it govern libel, slander, and battery.

ARGUMENT

I. NO SPECIAL OR IMPORTANT REASON EXISTS TO GRANT A WRIT OF CERTIORARI.

Respondent City of Columbus[1], Alphonso Montgomery, Dwight Joseph, David A. Dailey, Robert Snyder, Dennis Matco, O'Reeta Reed, and Michael See (hereinafter referred to collectively as the "Municipal Respondents") respectfully submit that, in the exercise of the sound discretion called for by Supreme Court Rule 10.1, this Court ought to deny the writ of certiorari.

Contrary to the position advanced by Petitioner, there is no conflict between circuits that needs to be addressed by this Court. The statutes involved, O.R.C. §§ 2305.09(D) and 2305.10, have not been the subject of review by any circuit court other than the Sixth Circuit. No circuit court has addressed the issue of borrowing a statute of limitations from the law of the State of Ohio and come to a result contrary to the holding of *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989) (en banc).

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[1] The City of Columbus is a municipal corporation organized and existing pursuant to its charter and the law of the State of Ohio. It has no parent corporation and no subsidiaries.

Furthermore, the cases from the Seventh Circuit cited by Petitioner either support the logic and result of *Browning* or interpret a different statutory scheme of limitations of actions. *Kalimara v. Illinois Department of Corrections*, 879 F.2d 276 (7th Cir. 1989) applied Illinois's two year statute of limitations for damages for injury to the person to Section 1983 actions arising in Illinois. Just as O.R.C. § 2305.10 applies to actions for "bodily injury," the Illinois statute selected in *Kalimara*, Ill. Rev. Stat. Chapter 110, paragraph 13-202, applies only to "direct physical injury." *Berghoff v. R.J. Frisby Manufacturing Co.*, 720 F.Supp. 649, 652 (N.D. Ill. 1989), citing *Bassett v. Bassett*, 20 Ill.App. 543 (1886).

Another case cited by Petitioner, *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989) addressed the borrowing of a general or residual statute of limitations for personal injury actions from the law of Wisconsin. Wisconsin's statutory scheme is markedly different from that of Ohio in that Wisconsin has a specific statute of limitations for claims such as loss of spousal consortium or other actions for damages "for an injury to the character or rights of another . . . ". 885 F.2d at 407, citing Wisc. Stat. Ann. Section 893.53 (West, 1983). This particular statute of limitations, according to *Gray*, was earlier interpreted by a Wisconsin Court of Appeals to be a general or residual statute of limitations for personal injury actions as is required by *Owens v. Okure*, 488 U.S. 235, 102 L.Ed.2d 594 (1989). *Gray v. Lacke*, 885 F.2d at 408, citing *Segall v. Hurwitz*, 114 Wis.2d 471 (Wis. App. 1983). Ohio Revised Code § 2305.09(D) has never been so labelled as a general or residual statute of limitations for personal injury actions by any court, state or federal.

Furthermore, it would be unwise to review Ohio's scheme of statutes of limitation at this time. As will be seen, *infra*, the selection of Ohio's general or residual statute of limitations for personal injury actions is guided primarily by Ohio's definition of personal injury. Petitioner wrongfully expands on that definition to include general tort claims which are not claims for personal injury under the law of Ohio. *Smith v. Buck*, 119 Ohio St. 101 (1928). As the holding in *Buck* has not been overruled or even questioned by the Supreme Court of Ohio in more than 62 years, this Court should refrain from accepting Petitioner's invitation to redefine "personal injury" under Ohio law and then, as a result of that redefinition, undo the certainty that *Browning* has afforded practitioners litigating Section 1983 claims arising in Ohio.

II. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY DECIDED THAT REVISED CODE SECTION 2305.10 IS OHIO'S GENERAL OR RESIDUAL STATUTE OF LIMITATIONS FOR PERSONAL INJURY ACTIONS.

A. REVISED CODE SECTION 2305.10 IS OHIO'S GENERAL OR RESIDUAL STATUTE OF LIMITATIONS FOR PERSONAL INJURY ACTIONS.

The Municipal Respondents agree that the decisions in *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Owens v. Okure*, 488 U.S. 235, 102 L.Ed. 2d 594 (1989), require that the trial court apply, as the statute of limitations for an action pursuant to 42 U.S.C. § 1983, the "general or residual statute for personal injury action" in Ohio.

Owens v. Okure, 102 L.Ed. 2d at 606. However, the Municipal Respondents contend that O.R.C. § 2305.10 rather than O.R.C. § 2305.09(D) is that "general or residual statute."

In *Browning v. Pendleton*, 869 F.2d 989 (1989), the United States Court of Appeals for the Sixth Circuit, sitting *en banc*, held:

> . . . . the appropriate statute of limitations for 42 U.S.C. § 1983 civil rights actions arising in Ohio is contained in Ohio Rev. Code Ann. § 2305.10, which requires that actions for bodily injury be filed within two years after their accrual. 869 F.2d, at 992.

This holding has been followed in two decisions reported subsequently. *Thomas v. Shipka*, 872 F.2d 772 (6th Cir., 1989), vacating 829 F.2d 570 (6th Cir., 1987). *Emmons v. McLaughlin*, 874 F.2d 351, 354 (6th Cir., 1989). Accordingly, the law in the Sixth Circuit Court of Appeals has been established for nearly two years that O.R.C. § 2305.10 governs the filing of civil actions arising in the state of Ohio that allege violations of 42 U.S.C. § 1983.

B. REVISED CODE SECTION 2305.09(D) IS NOT OHIO'S GENERAL OR RESIDUAL STATUTE OF LIMITATIONS FOR PERSONAL INJURY ACTIONS.

Petitioner wrongly asserts that O.R.C. § 2305.09(D) is that general or residual statute of limitations for personal injury actions. That error results from a misunderstanding of the types of civil actions to which O.R.C. § 2305.09(D) has been applied as the appropriate statute of limitations.

While the Municipal Respondents agree that O.R.C. § 2305.09(D) governs actions for loss of spousal consortium and services [*Kraut v. Cleveland Ry. Co.*, 132 Ohio St. 125 (1936); *Corpman v. Boyer*, 171 Ohio St. 233 (1960); *Dean v. Angelas*, 24 Ohio St. 2d 99 (1970); *Amer v. Akron City Hospital*, 47 Ohio St. 2d 85 (1976); and *Holzwart v. Wehman*, 1 Ohio St. 3d 26 (1982)], loss of a child's services and attendant medical expenses [*Whitehead v. General Telephone Co.*, 20 Ohio St. 2d 108 (1969); and *Seguin v. Gallo*, 21 Ohio App. 3d 163 (1985)], and infliction of serious emotional distress [*Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131 (1983); *Paugh v. Hanks*, 6 Ohio St. 3d 72 (1983); and *Yeager v. Local Union 20*, 6 Ohio St. 3d 369 (1983)], none of those cases ever held, let alone suggested, that the actions being adjudicated were ones for "personal injury" as defined by Ohio law. The opinions uniformly abstain from describing loss of consortium actions or actions for infliction of emotional distress, intentional or negligent, as personal injury actions.

On the contrary, the law of Ohio contrasts consortium claims with other related claims that are, in law, ones for personal injury. In *Kraut v. Cleveland Ry. Co.*, 132 Ohio St. 2d 125 (1936), the Supreme Court of Ohio held:

> Such an action by the husband (for loss of services and for expenses for care and medical attention growing out of his wife's injury) is not one for bodily injury within the meaning of Section 11224-1, General Code, prescribing a two-year limitation, but comes under Paragraph four of Section 11224, General Code, providing for a four-year limitation.

In *Corpman v. Boyer*, 171 Ohio St. 233 (1960), the Court held:

> A husband's *action for consequential damages* occasioned by malpractice of a physician upon his wife is for an injury to his rights not arising on contract or enumerated in the Revised Code sections set forth in paragraph (D), Section 2305.09, Revised Code, and must be commenced within the period prescribed thereby. (Emphasis supplied.)

In *Dean v. Angelas*, 24 Ohio St. 2d 99 (1970), the Supreme Court of Ohio followed *Corpman* and held that an action for consortium is "an action for an injury to the rights of the former spouse (i.e. the plaintiff) not arising upon contract . . . ". 24 Ohio St. 2d, at 100.

In *Amer v. Akron City Hospital*, 47 Ohio St. 2d 85, the Supreme Court of Ohio described the action for loss of consortium, loss of services and medical expenses as one "*for consequential damages* arising from, or having its origin in, alleged acts of malpractice to a plaintiff's spouse." 47 Ohio St. 2d at 87, emphasis supplied, fn. omitted.

In *Whitehead v. General Telephone Co.*, 20 Ohio St. 2d 108 (1969), the Supreme Court of Ohio held:

> Where a defendant negligently causes injury to a minor child, that single wrong gives rise to two separate and distinct causes of action: *an action by the minor child for his personal injuries* and a *derivative action in favor of the parents of the child for the loss of his services* and his medical expenses. (Emphasis supplied.)

In *Seguin v. Gallo*, 21 Ohio App. 3d 163 (1985), the Court of Appeals for Cuyahoga County likewise labeled the parents' action as "derivative."

In *Schultz v. Barberton Glass*, 4 Ohio St. 3d 131 (1983), the Supreme Court recognized negligent infliction of serious emotional distress without a contemporaneous physical injury as a "cause of action." The opinion never identified this newly-recognized cause of action as one for personal injuries.

In *Paugh v. Hanks*, 6 Ohio St. 3d 72 (1983), the Supreme Court of Ohio followed and explained *Schultz*. To be actionable, negligent infliction of serious emotional distress must result in "emotional injuries" that are both serious and reasonably foreseeable. 6 Ohio St. 3d at 72. The opinion never identifies the cause of action as one for personal injuries, nor describes the injuries as anything but "emotional."

In *Yeager v. Local Union 20*, 6 Ohio St. 3d 369 (1983), the Supreme Court of Ohio recognized intentional and reckless infliction of serious emotional distress as causes of action. At no time are these causes of action labeled as ones for "personal injury."

The language used in various opinion precludes any thoughtful conclusion that these general tort actions are, instead, actions for personal injury. On the contrary, these are actions: "not one for bodily injury" (*Kraut*); "for consequential damages" (*Corpman* and *Amer*); "for an injury to rights. . . . not arising upon contract" (*Dean*), and actions derivative from those of injured minor children (*Whitehead* and *Seguin*).

C. UNDER OHIO LAW, "PERSONAL INJURY" DOES NOT INCLUDE A LOSS OF CONSORTIUM OR AN INFLICTION OF SERIOUS EMOTIONAL DISTRESS.

This failure to use the label "personal injury" during the forty-seven years between the publication of the

decision in *Kraut* and that in *Yeager* is no fluke or accident. Rather, the failure to use the label is consistent with, and compelled by, the law of Ohio.

In *Smith v. Buck*, 119 Ohio St. 101 (1928), the Supreme Court of Ohio authoritatively defined the phrase "personal injury." The Court held:

> The words "personal injury" as defined by lexicographers, jurists and text writers, and by common acceptance, denote an injury either to the physical body of a person or to the reputation of a person, or to both. 119 Ohio St. at 101.

The two kinds of personal injury in Ohio are injury to the physical body of a person (i.e. bodily injury) and injury to the reputation of a person (i.e. libel and slander). Because libel and slander are governed by a more specific statute of limitations (O.R.C. § 2305.11) and the intentional causing of bodily injury is governed by a more specific statute of limitations (O.R.C. Section 2305.111, for battery [App.-1]), O.R.C. § 2305.10 is, by default, the general or residual statute of limitations for all remaining personal injury actions. Stated another way, O.R.C. § 2305.10 governs *all* personal injury actions as defined in *Buck*, save libel, slander and battery.

Although actions for loss of consortium and for infliction of serious emotional distress are governed by O.R.C. § 2305.09(D), they are not actions for "personal injury" as defined by the law of Ohio. Hence, as loss of consortium and infliction of serious emotional distress are not examples of personal injuries under the law of Ohio, O.R.C. § 2305.09(D) does not govern *any* personal injury actions in Ohio. Ohio's approach, differentiating between personal injuries and other general tort claims, is

buttressed by a recent decision in which the Supreme Court of Ohio wrote: "General tort claims, including those for negligence, are governed by R.C. § 2305.09(D)." *Investors REIT One v. Jacobs*, 46 Ohio St. 3d 176, 179 (1989). Loss of consortium claims and emotional distress claims are governed by Section 2305.09(D) because they are general tort claims and not because they are personal injury claims governed by Section 2305.09(D) as a catchall statute of limitations for personal injury claims.

Although it is sometimes said that O.R.C. § 2305.10 governs only negligence actions alleging bodily injury as damages, that is not the case. O.R.C. § 2305.10 governs *all* actions alleging bodily injury as damages[2] and, for that reason, is the general or residual statute of limitations for personal injury actions in Ohio.

In *Andrianos v. Community Traction Co.*, 155 Ohio St. 47 (1951), the Supreme Court of Ohio held that General Code Section 11224-1, predecessor to O.R.C. § 2305.10,

> . . . providing that an action for bodily injury shall be brought within two years after the cause thereof arose, governs all actions the real purpose of which is to recover damages for injury to the person and losses incident thereto and it makes no difference whether such action is for a breach of contract or strictly in tort. The limitation is imposed on the cause of action and the form in which the action is brought is immaterial.

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[2] Except battery R.C. § 2305.111 [App.-1].

This use of O.R.C. § 2305.10 and its General Code predecessor as a general statute of limitations for personal injury actions, including actions other than negligence, was followed in *Lee v. Wright Tool & Forge Co.* 48 Ohio App. 2d 148 (1975) motion to certify overruled, 1975. In *Lee*, O.R.C. § 2305.10 was applied to an action for bodily injuries against the seller of a defective hand tool for breach of implied warranty. The Plaintiff-Appellee argued without success that the longer four year statute of limitations for breach of implied warranty under the Uniform Commercial Code as adopted in Ohio should apply. In *Levin v. Bourne*, 117 Ohio App. 269 (1962), O.R.C. § 2305.10 was applied to an action against parents who had signed the driver's license application of their child whose operation of a motor vehicle resulted in bodily injury to the plaintiff. The child's "negligence or willful misconduct" was imputed to the parents by operation of O.R.C. § 4507.07. In choosing the appropriate statute of limitations, the court looked to the nature of the wrong committed (personal injury) rather than the remedy to redress that wrong (action pursuant to a statute creating liability).

In short, O.R.C. § 2305.10 applies to all personal injury actions as defined by Ohio law except for libel, slander and battery which are, in turn, governed by other more specific statutes of limitations for them as particularized types of personal injuries under the law of the State of Ohio.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari ought to be denied. There is no special or important reason to review the choice of O.R.C. § 2305.10 as Ohio's general or residual statute of limitations for personal injury actions.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE SECTION 2305.111

An action for assault or battery shall be brought within one year after the cause of the action accrues. For purposes of this section, a cause of action for assault or battery accrues upon the later of the following:

(A) The date on which the alleged assault or battery occurred;

(B) If the plaintiff did not know the identity of the person who allegedly committed the assault or battery on the date on which it allegedly occurred, the earlier of the following dates:

(1) The date on which the plaintiff learns the identity of that person;

(2) The date on which, by the exercise of reasonable diligence, he should have learned the identity of that person.

(4)

No. 90-1031

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JACK HALLER,

Petitioner,

-v-

DONALD BORROR, ET AL.,

Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I. THE OHIO STATUTE OF LIMITATIONS FOR "BODILY INJURY" DOES NOT GOVERN ALL PERSONAL INJURIES AND THEREFORE DOES NOT APPLY TO 42 U.S.C. §§1983 AND 1985 ACTIONS

Respondents argue that the two-year statute of limitations governing actions for "bodily injury" (Ohio Revised Code §2305.10) should be applied to 42 U.S.C. §§1983 and 1985 cases.

Respondents' argument and the decision of the Sixth Circuit Court of Appeals are contrary to the express language of Owens v. Okure, ___ U.S. ___, 109 S.Ct. 573 (1989) and to decisions by circuit courts interpreting Owens. This case is significant because the court below ignored this Court's direction in Owens.

Respondents have argued that the two year "bodily injury" statute of limitations is reasonable for federal civil rights actions because federal courts in other states have upheld one or two year statutes of limitations for civil rights actions. (See Brief of Respondent Borror, at 8.) The question to be answered, however, is not whether a one, two, or four year statute of limitations is reasonable

for civil rights cases. The question is which statute of limitations is the general or residual statute of limitations for all personal injury cases in a particular state.

Respondents ignore the fact that this Court stated in Owens, supra, that the statute of limitations for federal civil rights actions must be broad enough to cover the full panoply of rights and remedies covered by the civil rights statutes--from the denial of First Amendment rights, to the deprivation of medical facilities in prisons, to the denial of equal employment opportunities. See, Owens, supra, 109 S.Ct. at 581. Not all violations of federal civil rights statutes involve bodily injury. Indeed, many violations of civil rights laws involve mental and emotional distress or a loss of earnings. A statute of limitations governing only bodily injury can not, under the doctrine enunciated in Owens, be the general personal injury statute applicable to all civil rights actions.

Respondents have argued that the Ohio statute of limitations governing "injury to the rights of the plaintiff" not enumerated in other sections could not be the general personal injury statute of limitations because that statute does not say that it is the "personal injury" statute of limitations. (Brief of respondent Borror, at 12-14.) Respondents ignore the unequivocal language of Owens as to what constitutes a general personal injury statute of limitations.

This Court stated in Owens that there are two different types of statutes of limitations "governing personal injury actions": "a general provision which applies to all personal injury actions with certain specific exceptions" and "a residual provision which applies to all actions not specifically provided for, including personal injury actions." Owens, supra, 109 S.Ct. at 580 (emphasis added).

Ohio does not have a "general provision which applies to all personal injury actions."

[Emphasis added.] The statute of limitations which, according to respondents, is the general personal injury statute of limitations does not apply to all personal injuries; it applies to only bodily injuries. Therefore, the general statute of limitations applicable to personal injury actions in Ohio must be the second type of statute articulated in Owens: "a residual provision which applies to all actions not specifically provided for...." Ohio Revised Code §2305.09(D) is such a statute; it applies to actions for "injury to the rights of the plaintiffs (including personal injuries)" not enumerated in other sections.

Ohio courts have applied O.R.C. §2305.09(D) to personal injuries not involving physical or bodily injuries. Thus, O.R.C. §2305.09(D) governs such personal injuries as intentional infliction of emotional distress, Yeager v. Local Union 20, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983), and invasion of privacy, Morgan v. Hustler Magazine, 653 F.Supp. 711 (N.D. Ohio

1987). Respondents make the preposterous argument that the torts of intentional infliction of emotional distress and invasion of privacy do not involve personal injuries, because the Ohio courts which created them did not use the word "personal injury" in describing them. There is no reason why the Ohio courts would put a label on non-physical torts. It cannot be seriously debated that intentional infliction of emotional distress and invasion of the right to privacy are not injuries to the person.

Respondents also state that in 1928 the Ohio Supreme Court defined "personal injury" as "'an injury either to the physical body of a person or to the reputation of a person, or to both.'" [Brief of Respondent Borror, at 15 and municipal respondents, at 9, quoting Smith v. Buck, 119 Ohio St. 101 (1928).] Respondents continue that such torts as intentional infliction of emotional distress and invasion of privacy are not "personal injuries" because they

are not injuries to the physical body or result in a loss to reputation.

What respondents fail to mention, however, is that torts such as intentional infliction of emotional distress and invasion of privacy did not exist in 1928, and therefore the Ohio Supreme Court could not have included them in its definition of personal injuries. The Ohio Supreme Court was saying that there are two components to personal injuries: the physical and the non-physical. Libel and slander were the primary non-physical (or dignitary) torts in 1928.

Petitioner is aware of the fact that in determining the applicable statute of limitations for actions brought under 42 U.S.C. §1983 one does not apply the statute of limitations that governs some but not all of the claims that are analogous to federal civil rights claims. Petitioner points out that Ohio courts have applied the general four year statute of limitations for claims such as

invasion of the right to privacy and intentional infliction of emotional distress in order to show that Ohio courts have held the "bodily injury" statute of limitations not applicable to all personal injuries. Since the bodily injury statute (O.R.C. §2305.11) does not apply to all personal injuries, this Court's holding in Owens, supra, requires that the general catch-all statute governing "injury to the rights of the plaintiff" be applied to federal civil rights actions.

Respondents are, of course, correct in asserting that the Sixth Circuit Court of Appeals is the only federal appellate court that has determined which state statute of limitations in Ohio governs civil rights claims. The decisions of other federal appellate courts, however, are instructive, because all of these courts have held that statutes of limitations governing personal injuries or injuries to the rights of persons are applicable to federal civil rights actions. None of these appellate

courts, with the possible exception of the Seventh Circuit Court of Appeals, have held that a statute applicable to only "bodily injury" governed civil rights actions.

The Seventh Circuit Court of Appeals issued two decisions interpreting Owens, supra, which appear to conflict with one another. One panel of the Seventh Circuit held that an Illinois statute of limitations applicable to "personal injuries" and interpreted by Illinois courts to be limited to "bodily injuries" was the most analogous statute of limitations for federal civil rights actions. See, Kalimara v. Illinois Department of Corrections, 879 F.2d 276, 277 (7th Cir. 1989), and Berghoff v. R.J. Frisby Manufacturing Co., 720 F.Supp. 649, 652 (N.D.Ill. 1989).[1]

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[1]The Seventh Circuit Court of Appeals did not engage in any analysis of how Illinois state courts interpreted the phrase "injury to the person." Kalimara v. Illinois Department of Corrections, supra. The court merely stated that a statute governing actions involving "injury to the person" was the residual personal injury statute of limitations in Illinois.

(continued...)

Another panel of the Seventh Circuit Court of Appeals held that a Wisconsin statute similarly worded to the Illinois statute did not govern civil rights actions. Instead, a Seventh Circuit Court panel held that the statute applicable to "injury to the rights of another" should be applied to civil rights actions. The Court of Appeals held that the broad catch-all statute of limitations provided "a remedy for a 'wide spectrum of claims' that include more than bodily injury." Gray v. Lacke, 885 F. 2d 399, 408 (7th Cir. 1989), cert denied, ___ U.S. ___,

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[1](...continued)
A federal district court conducted an extensive analysis of interpretations by Illinois courts of "injury to the person". Berghoff v. R.J. Frisby Manufacturing Co., 720 F.Supp. at 652-654. The Berghoff Court concluded that Illinois courts have held that "injury to the person" applied only "to direct physical injuries". The district court held that the statute governing "injuries to the person" did not apply to a case alleging a retaliatory discharge, because the retaliatory discharge did not involve physical injuries. Instead, the court applied the five year catch-all statute of limitations that applied to "all civil actions not otherwise provided for." Berghoff v. R.J. Frisby Manufacturing Co., 720 F.Supp. at 651, 654.

110 S.Ct. 1476 (1990) [emphasis added].

Thus, the decision of one panel of the Seventh Circuit Court of Appeals is consistent with holdings of the Sixth Circuit Court of Appeals, whereas the decision of another panel (see, Lacke, supra) is in direct conflict with the Sixth Circuit's interpretation of Owens, supra.

II. CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition for Certiorari, this Court should summarily reverse this case and remand it for reconsideration in light of Owens v. Okure, supra, or in the alternative, set this case down for oral argument to ensure conformity with this Court's decisions and to resolve conflicts among the circuit courts of appeals.

Respectfully submitted,

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